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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

vs.

MARTIN L. SWEENEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*

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BRIEF OF *AMICI CURIAE*

Preliminary

This brief is submitted on behalf of the American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee and the American Jewish Congress as *amici curiae,* pursuant to leave granted by this Court on March 2, 1942.

These organizations, as stated in our petition for leave to file this brief, are separate entities with nation-wide membership among American citizens of Jewish faith. They were established, among other purposes, to foster and promote better relations among the various racial and religious groups in this country. For many years, they have been actively engaged in protecting minority rights, combating anti-Semitism and in upholding civil liberty. They are, therefore, vitally interested in the present liti-

gation because of its relation to and effect upon their efforts in these regards and because of its relationship to the maintenance of the fundamental freedoms guaranteed by the Constitution.

The Question Discussed

The question in this litigation which particularly concerns the *amici curiae* is whether it is consistent with the constitutional guarantees of free speech and a free press to hold that a comment suggesting that the acts of a public official have been influenced by anti-Semitism is libelous *per se.*[*]

Short Statement of Facts

The publication complained of in the present action consists of an article by Drew Pearson and Robert S. Allen appearing in their column "Washington Daily Merry-Go-Round," which was published in the "Schenectady Union Star" as well as in many other newspapers throughout the country. The article asserted that Congressman Sweeney, the respondent, opposed the appointment of Emerich Burt Freed, the United States Attorney for Cleveland, to the Federal Bench because he was "a Jew, and one not born in the United States" (R. 3).

The respondent alleges by way of innuendo that the article meant and intended "to convey that plaintiff was and is guilty of Un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer * * *" (R. 3-4).

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[*] We are not discussing the question whether the challenged publication may fairly be construed as imputing anti-Semitism to the respondent. This brief considers merely the correctness of the ruling below on the assumption that the publication bears the construction put upon it by the respondent.

The District Court interpreted the article as not charging the respondent with anti-Semitism (R. 15), but ruled that even if it imputed anti-Semitism or racial prejudice to him, it would not be libelous *per se* under the law of New York (R. 18-19).

The majority opinion in the Circuit Court of Appeals (122 F. (2d) 288) holds that the article, by charging respondent with racial prejudice, subjects him to hatred, contempt and ridicule and is therefore libelous *per se* (R. 27). Judge CLARK dissented on the ground that the ruling of the majority is "not in accordance with New York law" and that it constitutes "new" and "definitely disturbing law" which is unsupportable as a matter of policy (R. 31).

Argument

I

The ruling of the majority in the Court below is a novel and dangerous extension of the law of libel which trenches upon fundamental constitutional liberties. To hold that the imputation of anti-Semitism is libelous *per se* is to abridge the constitutional guarantees of freedom of speech and of the press.

Liability for libel admittedly constitutes a recognized exception to the constitutional precepts of freedom of expression. The attrition of fundamental constitutional liberties, therefore, can be avoided only by keeping the law of libel strictly within the bounds marked by logic and sound policy. Manifestly, freedom of speech and of the press could be emptied of all significance if the law of libel were to be unduly extended to embrace comments not susceptible of a libelous interpretation. The threat of punitive liability imposes a curb upon expression and comment equally as potent as restraint by governmental

censorship or by the imposition of the "tax upon knowledge" invalidated in *Grosjean* v. *American Press Co.*, 297 U. S. 233.

Judge COOLEY, in a passage quoted by this Court in *Near* v. *Minnesota*, 283 U. S. 697, 715, stated:

> " 'The liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for *harmless publications.*' 2 Cooley, Constitutional Limitations, 8th ed. p. 885."[1] (Italics ours unless otherwise indicated.)

This reasoning applies with equal force to the imposition of punitive damages in a civil action for libel.

This Court has recently adverted to the possibility of conflict between "a common law concept of the most general and undefined nature"[2] such as breach of the peace[3] or contempt of court,[4] on the one hand, and the constitutional freedoms of speech and of press, on the other. Reconciliation of the competing social interests involved can be achieved only by the recognition that these freedoms constitute "the most cherished policies of our civilization"[5] and are "vital to the maintenance of democratic institutions";[6] that they must be "guarded with a jealous

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[1] " 'The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. 2 Cooley's Constitutional Limitations, 8th ed. p. 886.' " *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249.

[2] *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-308.

[3] *Cantwell* v. *Connecticut*, *supra*.

[4] *Bridges* v. *California*, — U. S. —, 86 L. ed. 149.

[5] *Bridges* v. *California*, *supra*, p. 151; *Thornhill* v. *Alabama*, 310 U. S. 88, 102.

[6] *Schneider* v. *State*, 308 U. S. 147, 161.

eye";[7] that they must be given "the broadest scope that could be countenanced in an orderly society"[8] since they are "the matrix, the indispensable condition, of nearly every other form of freedom;"[8a] that the only utterances which may be punished are those which threaten with a "degree of imminence extremly high"[9] an "extremely serious" "substantive evil";[10] that "silence coerced by law—the argument of force in its worst form"[11] is to be eschewed; that the remedy for the abuse of speech is "more speech, not enforced silence";[12] that "an indiscriminate ban on public expression that operates as an overhanging threat to free discussion"[13] cannot be tolerated; and that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions".[14]

In *Cantwell* v. *Connecticut*, 310 U. S. 296, where the issue was whether the common law of breach of the peace had been applied by the state court in a manner

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[7] *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325.

> "No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, * * *" STONE, *J.*, in *Hague* v. *C. I. O.*, 307 U. S. 496, 524. See also *Grosjean* v. *Am. Press Co.*, 297 U. S. 233, 243.
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> "In every case, therefore, where legislative abridgement of the rights [of free speech and free press] is asserted, the courts should be astute to examine the effect of the challenged legislation." *Schneider* v. *State*, 308 U. S. 161.

[8] *Bridges* v. *California*, *supra*, p. 154.

[8a] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

[9] *Bridges* v. *California*, *supra*, p. 153.

[10] *Id.*, p. 153; see also BRANDEIS, *J.*, concurring in *Whitney* v. *California*, 274 U. S. 357, 376.

[11] BRANDEIS, *J.*, concurring in *Whitney* v. *California*, 274 U. S. 357, 375-376.

[12] *Id.*, p. 377.

[13] FRANKFURTER, *J.*, dissenting in *Bridges* v. *California*, *supra*, p. 171.

[14] *Bridges* v. *California*, *supra*, p. 157.

consistent with the commands of the Federal Constitution, this Court described the nature of the process of adjudication that must be pursued in such cases, as follows:

> "Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact" (p. 307).

In concluding that there had been an abridgment of the constitutional freedom, the Court said:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to *exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.* But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy" (p. 310).

A similar potential conflict exists in the case of libel.

The classic definition of libel is but a "recitation of phrases that are the short-hand of a complicated historic process".[15] Applied mechanically, as was done by the

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[15] FRANKFURTER, *J.*, dissenting in *Bridges* v. *California, supra,* p. 170, in dealing with an analogous question.

court below, without recognition that the familiar terms in which such definitions are couched, such as hatred, contempt, ridicule and shame, are elusive words which have many shades of meaning and which through long usage have become words of art, the test of libel can easily be perverted into an effective instrument for the suppression of speech. The vagueness of its contours, the ambiguity of its terms, the breadth of its condemnation, and the harshness of its penalties [16] require the greatest caution in the application of this tort. The formula cannot be employed as the exclusive tool of decision without placing speech in the gravest jeopardy.

The correct application of the test, we submit, requires a delicate balancing of the interest of the public in free speech and a free press with the interest of the individual in the protection of his reputation. This entails a careful evaluation of the considerations of policy implicit in curbing expression and comment through the imposition of the punitive liability of libel *per se*.

The fact that an utterance may or does cause harm is not controlling in determining whether it is libelous *per se*. While recognizing that words may be potent instruments for the infliction of harm, the law has drawn the vital distinction between utterances which are actionable on proof of damages and utterances which are actionable *per se* without proof of damages.

The question here is not whether there should be liability for the actual injury, if any, which may be shown to result from the present publication—it is whether punitive damages may be assessed within the fluctuating dis-

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[16] "A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive * * *" BRANDEIS, *J.*, concurring in *Whitney* v. *California*, 274 U. S. 357, 377.

cretion of a jury without regard to the actual loss sustained or the degree of harm inflicted.[17]

What considerations of policy could possibly justify the imposition of presumptive liability for the publication of the statements here complained of?

The Court will take judicial notice of the fact that anti-Semitism has unfortunately spread in this country in recent years following its use abroad as an effective instrument of dictatorship. The threat of anti-Semitism to our democratic institutions is manifest. The *amici curiae* have naturally been much concerned with the intensification of racial and religious prejudice. But the democratic way of combating this evil is by the process of education and open and free debate rather than by the suppression of anti-Semitic preachments by legislative fiat.[18]

It must be remembered that the law provides no private remedy to minority groups which are the object of scurrilous attack. In most jurisdictions, including New York,[19] such minority groups may be vilified and defamed, directly or by innuendo, by the unbridled tongues of demagogues and bigots without civil redress. To deny such groups the right of full and effective answer in the best traditions of free American debate is to deprive them of the necessary means of self-defense. The normal process of public debate and education requires the free expression of opinion and the resort to the typical shorthand expressions and polemical epithets which have long characterized American argument.

The statement that a person is an anti-Semite is essentially an expression of opinion. It describes an attitude,

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[17] Respondent did not avail himself of the opportunity afforded him by the trial court to amend his pleadings by alleging special damages.

[18] A New Jersey statute along these lines was held unconstitutional recently in a case involving members of the German-American Bund. *New Jersey* v. *Klapprott*, 127 N. J. L. 395.

[19] See, *People* v. *Edmondson*, 168 Misc. 142. *Cf. Gross* v. *Cantor*, 270 N. Y. 93.

a point of view, a set of beliefs. Whether a person espouses or is influenced by anti-Semitism in his actions is necessarily a matter of inference. An orator in the course of an address may refer disparagingly to Jews as a class or to some Jews. Are newspapers, radio stations and other vehicles of communication to be visited with the onerous consequences of punitive liability for characterizing by way of answer and refutation such utterances as anti-Semitic and their author as an anti-Semite? Are they to be compelled in multitudinous lawsuits to assume the burden of establishing that the mental operations of the person criticised justifies their expression of opinion? Will not such restraints encourage anti-Semitism?

The rule contended for by the respondent must have far reaching effects. The imposition of liability on the grounds upon which it is here sought would necessarily result in the similar imposition of liability for the expression of belief on any matter upon which public feelings at any moment run high or of views which are regarded with distaste by substantial elements of the population.

As pointed out by Judge CLARK with great clarity in his dissent below (R. 32), the same reasoning which renders the imputation of anti-Semitism actionable *per se* would render equally libelous the statement that the respondent is philo-Semitic, or that he is pro- or anti-labor, pro- or anti-Negro, or that he favors or opposes any group which has its strong adherents and adversaries. There is scarcely any issue in the field of public debate on which opinions do not strongly clash. The sharper the division in public opinion the more spirited is the debate of the opposing forces. The epithets "isolationist" and "war-monger" were, in some circles prior to Pearl Harbor, as opprobrious as the charge complained of here. In a perfect world in which truth, justice and reason always prevailed, there might be no warrant for the resort to the customary procedures of public debate, comment and criticism. Certainly in the type of world in

which we find ourselves, especially in these tragic days, any curb upon such procedures would be fraught with the greatest danger to our democratic institutions and ways of life.

Similar reasoning underlies the ruling of this Court in *Bridges* v. *California*, — U. S. —, 86 L. ed. 149, where the Court states at page 156:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case."[20]

The dangers implicit in the misapplication of the libel formula were fully apprehended by James Madison, "the leader in the preparation of the First Amendment".[21] In opposing the Sedition Acts, which imposed a subsequent restraint upon "false, scandalous and malicious" writings which defamed or brought into "contempt or disrepute" or excited public "hatred" of the executive or legislative

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[20] The Court further states (p. 156): "It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion."

[21] *Bridges* v. *California, supra,* p. 154; *Near v. Minnesota,* 283 U. S. 697, 717.

branches of the federal government, he made the following observations, quoted by this Court in its opinion in *Near* v. *Minnesota,* 283 U. S. 697, 718:

> " 'In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands * * * Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had "Sedition Acts", forbidding every publication that might bring the constituted agents into *contempt* or *disrepute,* or that might excite the *hatred* of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?' "

The underlying principle was formulated with precision and clarity as early as 1774, when the Continental Congress in a letter sent to the Inhabitants of Quebec, stated:

> " 'The last right we shall mention, regards the freedom of the press. The importance of this consists,

> besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are *shamed or intimidated*, into more honourable and just modes of conducting affairs.' ''[22]

There can thus be no doubt that the ambit of the constitutional guarantee of free speech embraces the comment now claimed to be libelous. The Constitution, of course, does not interdict all restraints, prior or subsequent, upon speech. But to classify as a libel that which inherently is non-defamatory offends against the spirit and letter of the constitutional guarantees.

The same considerations which have led this Court to hold that peaceful picketing in a labor dispute may not be restrained (*American Federation of Labor* v. *Swing*, 312 U. S. 321), or that conduct inherently lawful may not be arbitrarily denounced as a breach of the peace (*Cantwell* v. *Connecticut*, 310 U. S. 296), or that comment upon and criticism of pending litigation not obstructive of the proper administration of justice may not be punished as a contempt of court (*Bridges* v. *California*, — U. S.—, 86 L. ed. 149), prevent the extension of the vague contours of the law of libel to include utterances of the type involved in this litigation. These considerations, in any event, must tip the scale whenever the defamatory nature of the challenged publication is as doubtful as is concededly the case here. The borderline character of the utterance is noted by the majority below which states in its decision:

> "Opinions or prejudices concerning the matter in hand might well lead to different conclusions" (R. 30).

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[22] Quoted in *Near* v. *Minnesota*, 283 U. S. 697, 717, and in *Thornhill* v. *Alabama*, 310 U. S. 88, 102.

In *American Federation of Labor* v. *Swing*, 312 U. S. 321, the Supreme Court of Illinois granted an injunction restraining picketing by a labor union. One of the grounds of its decision was that the placards carried by the pickets were libelous. The placards bore the inscription: "This Beauty Shop is Unfair To Organized Labor, Hairdressers and Cosmetologists Union Local 548-D, American Federation of Labor and Chicago Federation of Labor". This Court declared the injunction which restrained "peaceful picketing" was an invasion of the constitutional guarantee of free speech. Implicit in this ruling was a prohibition against the punishment of picketing on a claim that the placards contained libelous matter. To hold otherwise would run counter to and nullify the Court's ruling.

In *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, the Court of Appeals of the District of Columbia upheld an injunction which restrained the defendant from carrying placards bearing the following slogan: "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" On appeal this Court reversed, holding that the protective provisions of the Norris-LaGuardia Act applied to the economic dispute between the defendant Negro organization and a retail company which did not employ Negro workers in one of its stores. It would appear to be a fair inference from this decision that the Court in holding that picketing under these circumstances was permissible would not regard the language used by the defendants as libelous.

The bearing of these rulings upon the present litigation is manifest. Petitioner's article cannot be put in the same category as the historic instances of libel *per se* such as a charge of criminality. It is the improper classification and application of such offenses as breach of the peace, contempt and libel—and not the existence of the offenses themselves—which leads to the collision with the constitutional safeguards. There is no such "extremely

imminent" and "extremely serious" injury to reputation—the substantive evil to which the law of libel is addressed—caused by the challenged publication as would override the impelling policy favoring freedom of expression. As was stated in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249:

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

II

A crucial consideration in the present case is the fact that the respondent is a public officer.

One who enters the public arena by holding or seeking public office invites public approval of his acts and views. In so doing, he lays open his beliefs to public criticism and subjects his conduct to public appraisal.

To increase the effectiveness of his work, a member of Congress is clothed with an absolute privilege with respect to any utterance made on the floor of Congress. *Cochrane* v. *Couzens*, 59 App. D. C. 374, 42 F. (2d) 783. He may spread upon the Congressional Record his side of any controversy whether public or private.[23] He may use the franking privilege for the widest dissemination of his views. The same reasons of policy which result in his enjoying an absolute privilege against liability for libel require that there be the widest latitude on the part of commentators in appraising and criticizing the official's conduct and beliefs. Public officers must expect the searching inquiry of a public interested in its representatives.

> "Presidents and governors and legislators are public officials traditionally subject to political influence and the rough and tumble of the hustings, who have open

[23] The respondent followed this course in the present litigation (Congressional Record-Appendix, Nov. 25, 1941, p. A5634).

to them the traditional means of self-defense." (Mr. Justice FRANKFURTER, dissenting, in *Bridges* v. *California, supra,* p. 169.)

This is not to say that a person who enters public life exposes his reputation to unrestricted attack. It means merely that the test of libel in the case of statements concerning public officials is different from the test in the case of statements respecting private citizens. A statement uttered of a public official is defamatory only when it imputes to him gross incompetence or corruption in office. Charges of a lesser nature than gross incompetence or corruption in office, although harmful to the reputation of a public officer, are not libelous *per se.* This rule has been clearly enunciated in *Tanzer* v. *Crowley Pub. Corp.,* 240 App. Div. (N. Y.) 203, 268 N. Y. Supp. 620, where it is said (p. 205):

"One who holds public office must expect criticism. It may be captious, ill-timed and without foundation in fact, but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel. (*Mattice* v. *Wilcox,* 147 N. Y. 624.) Even an imputation of corrupt or dishonorable motive will be justified as fair comment if it is 'an inference which a fair minded man may draw from such facts.' (Gatley Libel and Slander, 383.) • • • Newspapers have the right to print both facts and comment in relation to the manner in which public officers perform their duties, and in doing so, reasonable accuracy and fair comment is all that is required. These should be publicly commensurate with the interest in public affairs. And the policy of the law is that the public should at all times be informed of the acts of its servants and the considerations to be applied in determining whether or not the public welfare is being served in order that it may be at all times aroused and alert to its just and essential part in the administration of government."

III

The majority in the Court below, instinctively opposing anti-Semitism which it properly deemed undemocratic and contrary to the best traditions of our American way of life, held that a charge of anti-Semitism, under the law of New York, would subject the plaintiff to hatred, contempt and ridicule on the part of a substantial portion of the population of the city of Schenectady where the article was published.

While we naturally agree with the majority's condemnation of anti-Semitism, we respectfully submit that the court failed to take cognizance of relevant legal and practical considerations. These considerations are developed with force by Judge CLARK in his dissenting opinion.

We do not suggest that it is not a serious matter to charge a person with anti-Semitism. Nor do we contend that there might not be liability for actual damage which may be shown to result from such charge.[24] Our position is that there is no warrant in the law of libel for holding such an imputation to be libelous *per se*, and it is our submission that the Federal Constitution requires that no such liability be imposed.

IV

We do not regard it as any answer to the views here elaborated that the defense of truth is available to the commentator in any suit brought against him. The memorable words of James Madison are directly pertinent:

> "In answer to such questions, it has been pleaded that the writings and publications forbidden by the act, are those only which are false and malicious, and intended to defame; and merit is claimed for the privilege allowed to authors to justify, by proving

[24] See the opinion of the trial court (R. 14) and the dissenting opinion in the Circuit Court below (R. 31).

the truth of their publications, and for the limitations to which the sentence of fine and imprisonment is subjected.

* * *

"But, whatever may have been the meritorious intentions of all or any who contributed to the Sedition Act; a very few reflections will prove, that its baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings.

"In the first place, where simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, of meeting a prosecution from the government, with the full and formal proof, necessary in a Court of law.

"But, in the next place, it must be obvious to the plainest mind, that opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a Court of law." [25]

Judge CLARK deals with the efficacy of the defense of truth in his dissenting opinion as follows (R. 33):

"I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense

[25] Resolutions of Virginia and Kentucky, Penned by Madison and Jefferson in Relation to the Alien and Sedition Laws and Debates in the House of Delegates of Virginia, pp. 57-58.

will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held."

V

We have refrained from discussing the problems incident to the application of the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, to the present case, which will no doubt be fully discussed in the briefs of the parties. It is our belief that the challenged publication does not offend the law of libel as developed by the courts of New York and that the law of New York was incorrectly applied below. But even if the present utterance is construed as libelous *per se* by the law of New York, such a rule of decision would, we submit, necessarily be in conflict with the Federal Constitution and require the corrective action of this Court.

WHEREFORE, the *amici curiae* respectfully urge this Court to reverse the judgment of the Circuit Court of Appeals and to reinstate the judgment of the District Court.

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